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DELAY IN COURTS OF REVIEW IN CRIMINAL CASES.

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Newspapers and legal journals, bar associations, lawyers and judges are quite generally united in a demand for reform in the administration of the criminal law and frequently the demand is accompanied by criticism of the methods of procedure of courts of review in criminal cases which are held largely responsible for delays and failures in the administration of justice. Whether conditions are so desperate that the administration of the criminal law may be properly said to have broken down as an unworkable machine, or to be a disgrace to civilization, as has been emphatically stated by gentlemen whose prominent positions give to their words weight with the public, may well be doubted. It will hardly be accepted as a fair statement of the administration of the criminal law in America, as has also been declared in the same manner, that if a man has the means to employ able counsel, he can in the great majority of cases escape punishment for crime. The critics of the courts seize upon an extreme case decided in any one of the State or Federal courts where an apparently just conviction has been reversed upon what may be regarded as a merely technical reason and generalizing from it, produce articles having a tendency to induce in the general reader the belief that such cases are fairly typical of the attitude of the courts toward criminal prosecutions. The Supreme Court of Ohio, a year ago, reversed a conviction for murder in which the name of the victim was alleged in the indictment as Percy Stuckey, alias Frank McCormick, because while the murder of Frank McCormick was proved, there was no evidence that he was the same person as Percy Stuckey or that there ever was such a person as Percy Stuckey. *Goodlove v. State*, 82 Ohio State, 365. The Supreme Court of Missouri reversed a conviction because of the omission of the word "the" before "State" in the formal conclusion of the indictment which should have been "against the peace and dignity of the State." *State v. Campbell*, 210 Mo. 202.

These cases have been published far and wide and have been frequently referred to as illustrations of the assumed disposition of the courts of appellate jurisdiction in criminal cases to disregard the merits and reverse judgments upon the most technical errors appearing in the record without reference to the guilt of the accused. Ordinarily no reference is made to the decisions in other cases to the contrary of the cases

referred to or to the vast number of decisions in which the courts of last resort have sustained convictions upon records abounding in technical error which was held not to have prejudiced the accused.

It is not proposed to defend or discuss these cases or other decisions in which it may be thought that undue weight has been given to technical or formal objections. It is no doubt true that cases occur where new trials are granted by appellate tribunals for irregularities in the proceedings in no way affecting the merits. All courts are likely to err in that way sometimes and some courts are perhaps more prone to do so than others. Whatever may be the effect of criminal procedure in appellate courts elsewhere upon the prompt and effective administration of the law and punishment of crime, the question of importance to the Illinois lawyer on this subject is the procedure and practice in his own State. This article does not concern itself with any laxity of administration of the law arising out of the organization of the trial court, or the methods of those charged with its enforcement, whether lawyers, judges or jurors, but only with the question of criminal procedure in appellate courts.

It may be observed, however, that no method of criminal procedure will secure the conviction, prompt or otherwise, of criminals in a community which has no respect for law or desire to have it enforced. Men guilty of crime and men innocent of crime have, in various parts of the country within the last few months, been brutally murdered—hanged, shot to death and burned to death—by crowds of American citizens in the presence of crowds of approving men, women and children, who also were American citizens. Has any one of the many who were well known in the respective communities to be guilty of these murders been convicted? How many have ever been brought to trial? How many indictments have been found? The difficulty in these cases does not lie in the method of procedure but in the public sentiment which condones the crime. If murder is condoned, is it surprising that the administration of the criminal law proves to be an unworkable machine in other cases, and that men escape the punishment for other crimes not because of the methods of the courts but because of the public sentiment of disregard for law?

Some delay necessarily arises in the preparation, argument, consideration and determination of an appeal. Only Judge Lynch's court administers with absolute promptness that which it does administer instead of justice. There only can those who demand punishment instant upon the supposed commission of crime be satisfied. Elsewhere established rules and recognized rights that prevail in all civilized tribunals which attempt to administer justice judicially necessarily require the delay indispensable for the orderly procedure of accusation, trial, de-

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fense, argument, consideration. Such delay cannot be avoided and such delay exists in the Supreme Court of Illinois. In that court a criminal case is decided, except in very rare instances, within seventy days after its submission. This certainly indicates no lack of promptness in dealing with criminal cases. The punishment for crime cannot be long delayed by suing out a writ of error. Even in the case of a heinous crime, there must be time for deliberation, orderly procedure, dispassionate judgment.

Some judgments of conviction are reversed and in some cases the reversals are for technical errors. But the attitude of the court toward technical error in the record of criminal cases is clearly expressed in the opinions of the court. Where the result reached by a judgment is clearly right, the court has frequently said it will not be reversed for errors which do not affect the substantial merits of the case. This has been said in substance in reference to errors in the admission and rejection of evidence, in the giving and refusing of instructions and in the conduct of opposing counsel. *Wilson v. People*, 94 Ill. 299; *Kirby v. People*, 123 id. 426; *Ochs v. People*, id. 398; *Johnson v. People*, 202 id. 53; *Wistrand v. People*, 218 id. 323. Where the verdict is clearly justified by competent evidence, a judgment will not be reversed for the admission of incompetent evidence which could not reasonably have affected the result. *People v. Nall*, 242 Ill. 284; *People v. Weston*, 236 id. 104; *DuBois v. People*, 200 id. 157; *Jennings v. People*, 189 id. 320; *Jackson v. People*, 126 id. 139. So where it appears from the whole record that error in the instructions given to the jury did not prejudice the defendant and substantial justice has been done, the judgment will not be reversed for such error. *People v. Anderson*, 239 Ill. 168; *People v. Casey*, 231 id. 261; *Bleich v. People*, 227 id. 80; *Murello v. People*, 226 id. 388; *Roberts v. People*, id. 296; *Dunn v. People*, 109 id. 635.

The last sixty volumes of the Illinois reports (volumes 191 to 250) cover practically the ten years from June, 1901, to June, 1911. They contain 258 criminal cases. Omitting those which involve only the constitutional validity of particular acts of legislation undertaken in the exercise of the police power, there remain 243 of which 150 were affirmed and 93 reversed. Somewhat more than three-fifths of the cases were affirmed and somewhat less than two-fifths were reversed. The reversals for the most part were either upon the merits of the case after a consideration of the evidence or for errors of the court in instructing the jury or receiving evidence which were considered so important as to have probably affected the verdict. Many judgments were affirmed in which similar errors were shown by the record but in which the court was convinced that the verdict was just and that the jury could not rea-

sonably have arrived at any other conclusion. The latest of these cases was the Cleminson murder case, in which the court found very grave and substantial error in the admission of incompetent testimony of so prejudicial a character as would have required the reversal of the judgment, if the competent evidence had left any room for doubt of the defendant's guilt. The court, however, in view of the conclusive proof of the defendant's guilt, affirmed the judgment in spite of the manifest error in the admission of the evidence. *People v. Cleminson*, 250 Ill. 135. In *People v. Weston*, 236 Ill. 104, in which the defendants were convicted of rape, the court referring to incompetent evidence said: "Besides there was abundance of competent uncontradicted testimony sufficient to sustain this verdict, and the result would undoubtedly have been the same if this incompetent evidence had not been admitted. Where this is true, error in the admission of incompetent evidence does not require a reversal of the judgment." The same principle was applied in *People v. De Pew*, 237 Ill. 574.

In a few cases reported in these sixty volumes reversals were had on strictly technical grounds. An information in the Municipal Court of Chicago presented by a person other than the State's Attorney is required by statute to be sworn to. The court overruled the defendant's motion to quash an unsworn information and a conviction followed. It was reversed because a defendant is entitled to a trial according to the law of the land and the form of proceeding prescribed by the statute must be observed. *People v. Zlotnicki*, 246 Ill. 185. In *March v. People*, 226 Ill. 464, an indictment for murder was quashed because the grand jury which returned it was not selected as required by the statute at a lawful meeting of the county board. These objections did not affect the guilt or innocence of the defendants, but the proceedings were in violation of a statutory requirement and therefore not authorized by law.

Reversals were also had in a conviction for larceny where the ownership of the stolen property was alleged in the "American Express Company, an association," *People v. Brander*, 244 Ill. 26; in another where the value of the stolen property was not alleged, *People v. Silbertrust* 236 Ill. 144; in a conviction for receiving stolen property where the indictment alleged ownership in a corporation and the proof showed it in an individual, *People v. Aldrich*, 225 Ill. 610; in a conviction for forgery where the indictment did not purport to set out an exact copy of the forged instrument, *People v. Tilden*, 242 Ill. 536; in a conviction for obtaining money by means of the confidence game when the proof was that the property obtained was a check, *People v. Lory*, 229 Ill. 268. In these cases no statutory right was violated, but in each case a well-

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recognized and thoroughly-established principle of the common law had been disregarded. The law was binding upon the court as well as upon the defendant and whether he was guilty or not guilty the court had no right to set aside an inconvenient rule of law which prevented his conviction. If the rule ought to be changed it was the province of the legislature, not of the court to change it.

In several cases reversals were had because the juries found the defendants guilty of a part only of the elements of the offense as in *People v. Lemen*, 231 Ill. 193, where in four counts the defendant was charged with an assault with a deadly weapon with intent to inflict bodily injury, two of the counts charging the assault to have been made, no considerable provocation appearing, and the other two charging the assault, the circumstances showing an abandoned and malignant heart. The verdict found the defendant guilty of assault with a deadly weapon, with intent to inflict bodily injury, but contained no finding as to the other statutory elements of the crime charged in the indictment. Cases similar in principle were *Donovan v. People*, 215 Ill. 520; *Mai v. People*, 224 id. 414; *People v. Lee*, 237 id. 222; *People v. Morton*, 245 id. 530. In none of these cases was the verdict merely guilty, or guilty as charged in some count of the indictment, but in each case the defendant was found guilty of certain elements necessary to constitute the crime and there was no finding as to some other element equally essential.

The court observes the rule that judgments will not be reversed for harmless error which could not have affected the result. Where incompetent evidence is received or competent evidence rejected, where the law is incorrectly stated to the jury or a correct statement is refused, where the judge has been guilty of improper conduct in the trial, the judgment may still have been rendered for the right party and perhaps no different judgment could have been rendered. Where this clearly appears the judgment should be affirmed. But frequently it is impossible for a reviewing court to say that the error actually did or did not affect the result. The tribunal authorized to pass upon the case is the jury and where the court can see that a jury acting reasonably might have arrived at a different result if the error complained of had not been committed, the defendant is entitled to the judgment of the jury. It is only where substantial justice has not been done because the defendant's guilt has not been established, or he has been denied the benefit of some constitutional or statutory right, or the court has proceeded in violation of some established rule of law, that a judgment will be reversed. It may be that some or many of these rules of law should be changed, but the constitutional right and power to change them rests with the legislative and not

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the judicial department of the State. The court might disregard them on the ground that they did not involve substantial right and justice. The measure of the defendant's rights would then be the judgment of the court in the particular case and the law would rest in the court's discretion. It might be desirable, if constitutional obstacles did not intervene, that the review by the Supreme Court of the record of a criminal trial should consist only of an examination of the evidence to ascertain whether the defendant had been guilty of some offense against the law and whether the punishment fitted the crime. Such a change is, however, impracticable. The delay or failure of justice in Illinois on account of delay in the appellate tribunals or on account of reversals on technical grounds is inconsiderable. The delay and failure of justice which occur at some times and in some places in the trial courts may be due in part to methods of legal procedure, but more than a reform of criminal procedure, are needed a quickening of public opinion to a regard for law and a desire for its observance, and a raising of the standard of morality and justice.